Supreme Court, U.S.
FILED
APR 26 2002
OFFICE OF THE CLERK

NO. 01-1427

IN THE

Supreme Court of the United States

WALGREEN CO.,

Petitioner,

v.

DAVID W. HOOD, in his official capacity as Secretary of the Louisiana Department of Health and Hospitals

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Of Counsel:

STEPHEN R. RUSSO
CHRISTINE M. ARBO
LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS
Bureau of Legal Services
P.O. Box 3836
Baton Rouge, LA 70821-3836
(225) 342-1103

CHARLES A. MILLER
Counsel of Record
CAROLINE M. BROWN
NATHAN A. BROWN
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2401
(202) 662-6000

Attorneys for Respondent

APRIL 26, 2002

QUESTION PRESENTED

Whether the Fifth Circuit Court of Appeals correctly held that Congress did not intend to create a private right of action under Section 1902(a)(30)(A) of the Social Security Act that would permit a national pharmacy chain to sue a State Medicaid agency on the grounds that even though the reimbursement rates it receives for participating in the State's Medicaid program are adequate, the reimbursement rates paid to other pharmacies are too high?

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 2001

WALGREEN CO.,

Petitioner,

v.

DAVID W. HOOD, in his official capacity as
Secretary of the Louisiana
Department of Health and Hospitals,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent David W. Hood, in his official capacity as Secretary of the Louisiana Department of Health and Hospitals ("DHH"), respectfully submits this brief in opposition to the petition for a writ of certiorari filed by petitioner Walgreen Co. ("Walgreen").

STATEMENT OF THE CASE

DHH is the state agency in Louisiana responsible for administering the State's Medicaid program. Petitioner is a national pharmacy chain that has elected to participate in the Louisiana Medicaid program.

1. The Medicaid program, Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 - 1396v, is a cooperative federal-

state public assistance program that provides federal financial assistance to participating States. The Medicaid program is administered by the States, subject to certain federal guidelines. A State participates in Medicaid pursuant to a state plan that establishes the various services to be provided and the reimbursement rates to be paid to the entities that provide these services. Plans are subject to the approval of the United States Department of Health and Human Services, Center for Medicare and Medicaid Services ("CMS"). *See* 42 U.S.C. § 1396; 42 C.F.R. § 430.10. Louisiana's state plan, including the pharmacy reimbursement rates Walgreen challenges in this case, has been approved by CMS.

2. There is no provision of the Medicaid statute dealing specifically with reimbursement for prescription drugs, but there are federal regulations on aggregate payment amounts. The relevant limit for purposes of Walgreen's challenge is that rates "must not exceed in the aggregate" the "[e]stimated acquisition costs" ("EAC") of drugs, plus reasonable dispensing fees. 42 C.F.R. § 447.331(b)(1). *See also* 42 C.F.R. § 447.301 (defining estimated acquisition cost). In Louisiana and virtually every other State, the EAC for each prescription drug (also known as "ingredient cost") is determined on the basis of Average Wholesale Price ("AWP").

Historically, many States, including Louisiana, have reimbursed pharmacies for prescription drug costs at AWP minus 10.5%, plus dispensing fees. *See* 26 *La Reg.* 220 (Feb. 20, 2000). Over the past several years, in part in response to prodding from federal officials and based on substantial federal reports that the AWP minus 10.5% level was overly generous to pharmacies, States have reviewed and altered their level of reimbursement.

3. In 1999, DHH commissioned the health care consulting firm of Myers & Stauffer LC ("M&S") to perform a study of the acquisition and dispensing costs of pharmacies participating in the Louisiana Medicaid program. M&S found substantial support for reducing reimbursement rates below AWP minus 10.5%. The report produced by M&S also indicated that there was a statistically significant cost differential between chain pharmacies and other dispensers (referred to for convenience as "independents") that supported a "tiered" reimbursement rate for independent and chain pharmacies. A chain store is defined for

purposes of Louisiana's Medicaid program as more than 15 commonly-owned Medicaid-enrolled drugs stores in the State. *See* 26 *La. Reg.* at 220-21.

In February 2000, DHH issued an Emergency Rule setting forth the rate structure that is the subject of Walgreen's challenge, as AWP minus 16.5% for chains and AWP minus 15% for independents.[1] The dispensing fees remained at the same levels. DHH published this rate structure as a final rule on August 20, 2000. *See* 26 *La. Reg.* 1629 (Aug. 20, 2000).

4. On August 11, 2000, Petitioner Walgreen Company, a national pharmacy chain with over 65 outlets in Louisiana, filed the complaint underlying this petition, challenging DHH's reimbursement rates on the grounds that the tiered reimbursement rates violated plaintiff's constitutional right to equal protection of the law and that Walgreen was receiving "less than lawful reimbursement for prescription drugs," in violation of Section 1902(a)(30)(A) of the Social Security Act ("the Act") and implementing regulations. R.[2] at 6, 7.[3]

Section 1902(a)(30)(A) provides that a state's plan must:

> provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services

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[1] The reimbursement rates have since been increased to AWP less 15% for chains and AWP less 13.5% for independent pharmacies. *See* 27 *La. Reg.* 1165 (Aug. 20, 2001).

[2] References to "R." are to pages in the record.

[3] Walgreen also challenged DHH's auditing process, alleged violations of its constitutional rights to due process and to be free from illegal search and seizure, and argued that DHH had generally acted in an arbitrary and capricious manner. *See* R. at 7, 8.

> are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.

42 U.S.C. § 1396a(a)(30)(A).

5. On October 23, 2000, Walgreen moved for a preliminary injunction. Departing from the allegation in its complaint, Walgreen argued in its motion not that the reimbursement rates it receives are too low, but that the rates other pharmacies receive are too *high*. *See* R. at 28, 29, 36. It did not allege that Medicaid recipients were not receiving adequate care or services due to the reduced rates. Nor did it allege that any of its pharmacies were forced to forgo participation in the Louisiana Medicaid program due to the level of reimbursement rates. *See id.*

The district court entered its judgment on February 1, 2001, and held that Walgreen was not entitled to preliminary injunctive relief. The court based its decision on the Fifth Circuit's holding in *Evergreen Presbyterian Ministries, Inc. v. Hood*, 235 F.3d 908 (5th Cir. 2000), decided while Walgreen's motion was pending, that Section 1902(a)(30)(A) did not create any enforceable right to a certain level of Medicaid reimbursement. *See* Petitioner's Appendix at 7a (hereinafter, "Pet. App."). The district court also rejected Walgreen's equal protection claim. *See* Pet. App. at 8a. On March 5, 2001, Walgreen filed a Notice of Appeal to the U.S. Court of Appeals for the Fifth Circuit.

On April 6, 2001, while its appeal was pending, Walgreen moved for partial summary judgment, alleging that DHH's rate structure was preempted by federal law under the Supremacy Clause. On October 10, 2001, the district court "administratively terminated" the case pending the Fifth Circuit's decision on the appeal, without deciding Walgreen's summary judgment motion.

The Fifth Circuit issued its decision on December 20, 2001, upholding the decision of the district court that Congress did not intend for providers to be able to sue under Section 1902(a)(30)(A), and thus that Walgreen had no rights under this statute that it could seek to enforce under Section 1983. *See Walgreen Co. v. Hood*, 275 F.3d 475 (5th Cir. 2001) (Pet. App. at 1a). In affirming the district court, the Fifth Circuit cited to its holding approximately one year earlier in *Evergreen Presbyterian Ministries, Inc. v. Hood*, that under this Court's standard for

finding a private right of action enunciated in *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990), providers were not the intended beneficiaries of Section 1902(a)(30)(A). *See Walgreen Co. v. Hood*, 275 F.3d at 477-78 (Pet. App. at 5a).

On January 24, 2002, the district court below granted Walgreen's motion to reopen its case, in which Walgreen's motion for summary judgment is pending. On March 20, 2002, Walgreen filed its petition for a writ of certiorari seeking interlocutory review of the affirmance of the order denying the preliminary injunction.

REASONS WHY THE PETITION SHOULD BE DENIED

This Court should not grant the writ requested in this case because the decision of the Fifth Circuit that petitioner may not sue under Section 1902(a)(30)(A) does not implicate any conflict of authority requiring this Court's attention. The decision of the Fifth Circuit is consistent with this Court's decisions in *Wilder v. Virginia Hospital Association* and other precedents regarding the statutory provisions that may be enforced under 42 U.S.C. § 1983. The cases relied on by the petitioner as allegedly in conflict with the decisions of the Fifth Circuit and Third Circuit are earlier cases prior to the repeal of the Boren Amendment—which was the provision at issue in *Wilder*—that fail to apply subsequent guidance by this Court emphasizing that a plaintiff must be the intended beneficiary of a specific statutory right in order to have a right of action.

Walgreen's claims in this case exemplify the correctness of the Fifth Circuit's and Third Circuit's rulings that Section 1902(a)(30)(A) does not create a right that Medicaid providers may enforce under Section 1983 to lay claim to a certain level of reimbursement. Petitioner does not seek a higher rate of reimbursement and does not allege that the rates it receives are insufficient for its pharmacies to continue participating in the Louisiana Medicaid program or otherwise to provide adequate services to Medicaid patients. Rather, Walgreen challenges the reimbursement rates paid to other providers as too high. Permitting these and other reimbursement challenges to proceed under Section 1902(a)(30)(A) would defeat Congress's goal in

repealing the Boren Amendment to eliminate suits by providers challenging their Medicaid reimbursement rates.

I. THERE IS NO CONFLICT OF AUTHORITY THAT WARRANTS THIS COURT'S ATTENTION.

A. The Decisions of the Third and Fifth Circuits Are Consistent With This Court's Reasoning in *Wilder*.

There is no conflict presented by this case, or any other case cited by Petitioner, regarding the scope of this Court's decision in *Wilder*. In *Wilder*, this Court considered whether the so-called Boren Amendment was enforceable against State Medicaid agencies under Section 1983. Under the Boren Amendment, a state Medicaid plan had to provide for payments to nursing homes, intermediate care facilities, and hospitals that "the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with the applicable State and Federal laws . . . ." 42 U.S.C. § 1396a(a)(13)(A) (repealed 1997).

In *Wilder* this Court recognized three elements that a plaintiff must demonstrate to establish an enforceable right actionable under Section 1983: (1) that Congress meant to confer on the plaintiff the benefit it claims; (2) that the asserted right is not so "vague and amorphous" as to strain judicial competence; and (3) that the asserted right is unambiguously imposed as a binding obligation on the State. 496 U.S. at 509. In a five to four decision, *Wilder* held that the plaintiff providers could sue to enforce what at the time was Section 1902(a)(13)(A). 496 U.S. at 512.

Subsequent decisions of this Court have emphasized *Wilder*'s holding that to bring an action under Section 1983, a putative plaintiff must have an unambiguous statutory entitlement that can be judicially enforced. In *Blessing v. Freestone*, this Court explained that Section 1983 provides redress only for a plaintiff who asserts a "violation of a federal *right*, not merely a violation of federal law." 520 U.S. 329, 340 (1997) (emphasis supplied). *Blessing* also pointed out that establishment of a right to sue under the *Wilder* test requires that Congress has

unambiguously conferred an "individual entitlement" upon each of the plaintiffs in the case. 520 U.S. at 343. *See also Suter v. Artist M.*, 503 U.S. 347, 363 (1992) (no right of action where statute "does not unambiguously confer an enforceable right upon the Act's beneficiaries").

In arguing that the cases construing Section 1902(a)(30)(A) should be "squarely controlled" by *Wilder*, petitioner apparently means that they should be controlled by its *result*—giving Medicaid providers a right to sue—rather than by its *reasoning* analyzing the statutory language. As Walgreen acknowledges, *Wilder* did not consider whether a right of action exists under Section 1902(a)(30)(A). It held only that the plaintiff could sue under what was at the time Section 1902(a)(13)(A). *See* Petition at 14.

In the present case, the Fifth Circuit applied the three-part showing from *Wilder* (as cited in *Blessing*), and held that providers are not an intended beneficiary of Section 1902(a)(30)(A). *Walgreen*, 275 F.3d at 477-78 (Pet. App. at 4a-6a). The *Walgreen* decision relied heavily on the Fifth Circuit's decision in *Evergreen Presbyterian Ministries, Inc. v. Hood* just one year earlier. *Evergreen* also adhered to the three-part *Wilder* test, looked for guidance from the *Wilder* analysis as applied to the Boren Amendment, and concluded that, "in contrast to the Boren Amendment, section [1902(a)(30)(A)] does *not* create an individual entitlement in favor of any provider." *Evergreen*, 235 F.3d at 929 (emphasis in original).

Similarly in *Pennsylvania Pharmacists Association v. Houstoun* ("*PPA*"), the Third Circuit began by applying the three-part test articulated in *Wilder*. *PPA*, No. 00-1898, 2002 WL 389273, at *3 (3d Cir. Mar. 13, 2002) (Pet. App. at 21a-22a). Ultimately, the court concluded that Section 1902(a)(30)(A), *unlike* the Boren Amendment, did not entitle providers to sue:

> as we began by cautioning, the *inquiry mandated by Wilder and Blessing*—whether Congress intended for Section [1902(a)(30)(A)] to benefit providers as opposed to simply knowing that providers would be benefitted—calls for us to draw a fine line and take into account the precise statutory language adopted by Congress. After

> considering the language of the Boren Amendment and Section [1902(a)(30)(A)], we remain convinced that there are critical differences and that Section [1902(a)(30)(A)], unlike the Boren Amendment, was not intended to benefit providers.

PPA, 2002 WL 389273, at *7 (Pet. App. at 34a) (emphasis supplied).

To suggest that a right of action under one provision of the Social Security Act creates enforceable rights generally would "paint[] with too broad a brush." *Blessing*, 520 U.S. at 342. *Wilder* held that the Boren Amendment was intended to benefit providers because it was "phrased in terms benefiting" providers, as it "establishe[d] a system for reimbursement of providers" that through the requirement of "reasonable and adequate" rates was directly linked to their financial interests. 496 U.S. at 510. In sharp distinction, the Fifth Circuit found in *Evergreen* (cited with approval in the decision below) that Section 1902(a)(30)(A) "does *not* focus directly on providers." 235 F.3d at 929 (emphasis supplied). The Fifth Circuit even provided an example demonstrating that a State could establish payment rates guaranteeing the standards for care and services for recipients under the statute that would not advance providers' financial interests. *See id.*

The Third Circuit in *PPA* likewise pointed out that while the Boren Amendment "measured the sufficiency of payments by reference to the economics of providers," Section 1902(a)(30)(A) "does not demand that payments be set at levels that are sufficient to cover provider costs . . . . [I]t evinces no direct concern for the economic situation of providers." *PPA*, 2002 WL 378273, at *5 (Pet. App. at 28a). Far from being in conflict with *Wilder*, the Fifth Circuit and Third Circuit faithfully applied the standard of this Court for finding a right of action, as articulated in *Wilder* and the later decisions.

B. The Contrary Authority That Petitioner Cites From Other Circuits is Outdated.

After *Wilder* recognized the right to sue under the Boren Amendment, providers brought numerous suits challenging States' reimbursement rates. These suits resulted in complicated, confusing, and hard to reconcile holdings as to how the statute

should be applied and what was required of the State to justify its rates. *Compare, e.g., AMISUB (PSL), Inc. v. Colorado Dep't of Social Services*, 879 F.2d 789 (10th Cir. 1989) *with Lett v. Magnant*, 965 F.2d 251 (7th Cir. 1992) *and with Pinnacle Nursing Home v. Axelrod*, 928 F.2d 1306 (2d Cir. 1991) *and with New Jersey Hospital Ass'n v. Waldman*, 73 F.3d 509 (3d Cir. 1995). The Boren Amendment soon became a "definitional abyss [that] spawned considerable litigation." *Lett*, 965 F.2d at 253. Moreover, the many decisions in this area were "heavily fact based and provide[d] little precedential guidance." *Memorial Hospital, Inc. v. Childers*, 896 F. Supp. at 1427, 1435 (W.D. Ky. 1995).

By 1997, it was obvious that Boren Amendment litigation was costing States considerable money and imposing inconsistent obligations on them. Moreover, Medicaid reimbursement rates were in a state of continuous uncertainty, and some cases resulted in excessive rates of reimbursement. Finally, Congress decided to repeal the Boren Amendment in 1997. *See* Balanced Budget Act of 1997 ("BBA"), Pub. L. No. 105-33, § 4711(a)(1), 111 Stat. 251, 507-08. As the House Report explained, "A number of Federal courts have ruled that state systems failed to meet the test of 'reasonableness' and some States have had to increase payments to these providers as a result . . . ." H.R. Rep. No. 105-149, at 590 (1997). By repealing the Boren Amendment in the BBA, it was Congress's "intention that . . . neither this *nor any other provision of Section 1902* will be interpreted as establishing a cause of action for hospitals and nursing facilities relative to the adequacy of rates they receive." *Id.* at 591 (emphasis supplied).

The decisions of the Fifth Circuit in the instant case and in *Evergreen*, and of the Third Circuit in *PPA*, are the only court of appeals cases to have considered whether a provider can sue under Section 1902(a)(30)(A) in light of the repeal of the Boren Amendment and the *Blessing* decision. In conformity with this Court's teaching that "[t]he intent of Congress remains the ultimate issue," *Thompson v. Thompson*, 484 U.S. 174, 179 (1988), these courts have analyzed the language of Section 1902(a)(30)(A) and correctly concluded that, even if this provision offers some ancillary benefit to providers through ensuring standards for the services offered to Medicaid recipients, providers were not Congress's intended beneficiaries.

The decisions of the First, Seventh, and Eight Circuits cited by petitioner as purportedly in conflict with the Fifth and Third Circuits each pre-date the 1997 repeal of the Boren Amendment, and each found a right of action for providers by analogy to the Boren Amendment. *See Arkansas Medical Society, Inc. v. Reynolds*, 6 F.3d 519, 526 (8th Cir. 1993); *Visiting Nurse Ass'n of North Shore, Inc. v. Bullen*, 93 F.3d 997, 1002-03 (1st Cir. 1996); *Methodist Hospitals, Inc. v. Sullivan*, 91 F.3d 1026, 1029 (7th Cir. 1996). Each of these cases also pre-dates this Court's decision in *Blessing* emphasizing that a putative plaintiff must be the intended beneficiary of a specific statutory entitlement. In analogizing to the Boren Amendment, these cases found enforceable rights for providers merely because Section 1902(a)(30)(A) speaks in terms of payments and therefore affects providers. *See Reynolds*, 6 F.3d at 526 (finding right of action because, similar to the Boren Amendment, Section 1902(a)(30)(A) "addresses payment for 'care and services'"); *Bullen*, 93 F.3d at 1003 (like Boren Amendment, Section 1902(a)(30)(A) creates right of action because "health care providers, as payees, obviously are affected by substantive changes in State reimbursement schemes"); *Sullivan*, 91 F.3d at 1029 (holding that *Wilder* "binds" the court with regard to Section 1902(a)(30)(A)).

In light of Congress's repeal of the Boren Amendment—with the intent to prevent litigation by providers over reimbursement rates—and the statutory construction underlying the decision in *Blessing*, the holdings in these earlier cases allowing providers to sue under Section 1902(a)(30)(A) have lost their persuasive authority. *See American Society of Consultant Pharmacists v. Garner*, 180 F. Supp. 2d 953, 972 (N.D. Ill. 2001) (commenting that intervening repeal of the Boren Amendment and subsequent Supreme Court decisions "will make for interesting debate if (or, perhaps more accurately, when) this issue again reaches the Seventh Circuit").

The most recent cases to have considered the issue are in agreement with the decision below that providers are not entitled to sue over payment rates under Section 1902(a)(30)(A). These courts, including the Fifth Circuit and the Third Circuit, as well as several district courts (except for those in the Circuits previously finding a right of action), have all found that while Medicaid recipients might be the intended beneficiaries of Section

1902(a)(30)(A), providers are not. *See Walgreen*, 275 F.3d at 478 (Pet. App. at 5a); *Evergreen*, 235 F.3d at 927-32; *PPA*, 2002 WL 389273, at *9 (Pet. App. at 41a); *Florida Pharmacy Ass'n v. Cook*, 17 F. Supp. 2d 1293, 1299 (N.D. Fla. 1998); *Prestera Ctr. for Mental Health Services, Inc. v. Lawton*, 111 F. Supp. 2d 768, 774-76 (S.D. W. Va. 2000).

These decisions, far from being in conflict with other Circuits, are in line with the many decisions holding that a plaintiff must identify discreet rights within a statute, and that the statutory language must unambiguously be intended for the benefit of the putative plaintiff. *See Ellison v. Cocke County*, 63 F.3d 467, 470 (6th Cir. 1995) (*quoting California v. Sierra Club*, 451 U.S. 287, 294 (1981)) ("[T]he question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries."); *Health Care Plan, Inc. v. Aetna Life Insurance Co.*, 966 F.2d 738, 740-41 (2d Cir. 1992) ("HCP, however, confuses the notions of 'beneficiary' and 'intended beneficiary.' . . . Congress intended to benefit consumers by injecting increased competition into the health care market and, . . . thus, viewed HMOs as a means rather than an end."); *Legal Services of Northern California, Inc. v. Arnett*, 114 F.3d 135, 138 (9th Cir. 1997) ("It may be that the grantee service providers will benefit from being selected for inclusion in the OAA grants program. But it is clear that Congress intended the statutory provisions at issue here to be for the benefit of elders in need of services . . . .").

II. PETITIONER'S OWN ALLEGATIONS DEMONSTRATE THAT THE FIFTH CIRCUIT WAS CORRECT TO FIND NO CAUSE OF ACTION.

Walgreen's suit against DHH exemplifies why Section 1902(a)(30)(A) should not be read to confer a right to providers to a certain level of reimbursement. Walgreen does not tie its claim to any of the statutory standards and does not even make an assertion as to how the rates it is paid might adversely affect Medicaid recipients. Instead, petitioner seeks to utilize Medicaid law to reduce the reimbursement rates of its competitors. Congress certainly did not intend that this type of suit be brought under Section 1902(a).

Walgreen's various pleadings and comments at oral argument present a moving target as to which of the standards in Section 1902(a)(30)(A) it seeks to rely on. Its petition offers only the vague assertion that it is seeking to enforce the statute's requirement of "fair and reasonable compensation"—a "requirement" that is nowhere to be found in the statute (and in repealing the Boren Amendment Congress explicitly omitted "reasonableness" as a measure of adequate compensation). Petition at 10.

Section 1902(a)(30)(A) can be read to establish four reimbursement rate standards: (1) efficiency, (2) economy, (3) quality of care, and (4) access to care (referred to as the "equal access" provision). *See PPA*, 2002 WL 389273, at *5 (Pet. App. at 27a). Walgreen cites to no cases—and Respondent is aware of no cases—that recognize a right of action for providers under the efficiency, economy, or quality of care standards of Section 1902(a)(30)(A). The few courts to even have considered this notion have rejected it. *See Cook*, 17 F. Supp. 2d at 1300; *Fulkerson v. Commissioner, Maine Dep't of Human Services*, 802 F. Supp. 529, 534-35 (D. Me. 1992).

The equal access standard indicates that a state plan must provide for payments that are "sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." 42 U.S.C. § 1396a(a)(30)(A). In the three cases cited by Walgreen, providers challenged rates as too low and alleged that the rates they received failed to ensure that a sufficient number of providers were participating in the State's Medicaid program to offer recipients "equal access" to care and services. After the Fifth Circuit's decision in *Evergreen*, however, Walgreen has effectively disavowed reliance on the equal access provision, as it seeks to distinguish that decision as precluding only a right of action for providers as to the equal access standard and not to the other standards in Section 1902(a)(30)(A). *See* Petition at 7.

Walgreen instead alleges that the rates established by DHH and approved by CMS lacked "factual basis" and were arbitrary and capricious, that the studies DHH commissioned were unreliable, and that DHH was motivated by a need to balance the State's budgets. Petition at 5, 9. None of these allegations, even

taken as true, can be tied to any language in Section 1902(a)(30)(A). Petitioner asks this Court to hold that Congress, even after it repealed the Boren Amendment in 1997, intended to allow providers to sue a State Medicaid agency if, for any reason, they are dissatisfied with the rates they *or their competitors* are being paid. There is no basis in the statutory language to support that result.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Of Counsel:

STEPHEN R. RUSSO
CHRISTINE M. ARBO
LOUISIANA DEPARTMENT OF
HEALTH AND HOSPITALS
Bureau of Legal Services
P.O. Box 3836
Baton Rouge, LA 70821-3836
(225) 342-1103

CHARLES A. MILLER
Counsel of Record
CAROLINE M. BROWN
NATHAN A. BROWN
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2401
(202) 662-6000

Dated: April 26, 2002

Attorneys for Respondent